Ethics for Government Environmental Attorneys

The Next Generation

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In 1999:

The issue

Keeping Client Confidences

vs

Self-Reporting

Or

What can I do to keep that ECAMP report from being released?

The issue

Keeping Client Confidences

Are the model rules an end state or a starting point?

What are Legal Ethics?

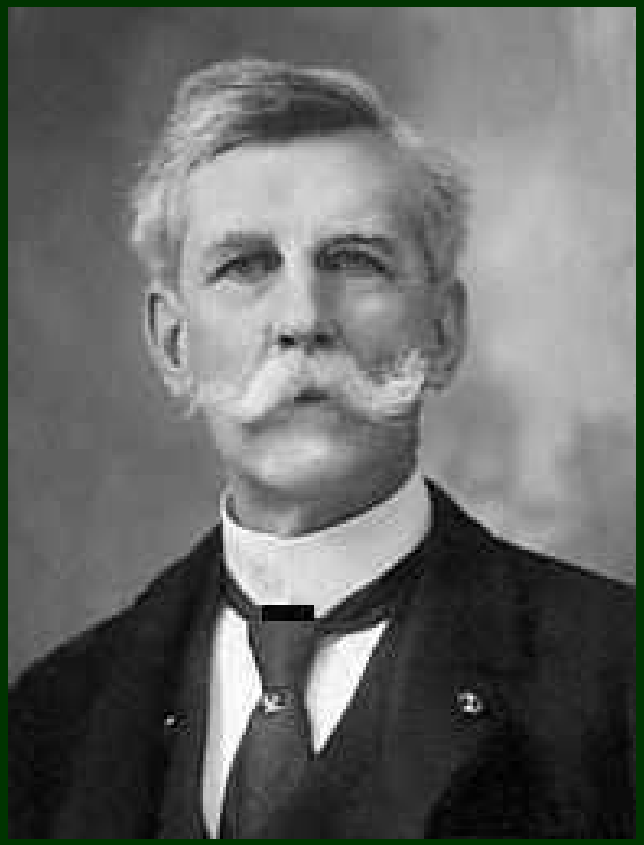
Regulatory Approach:

A list of rules prescribing enforceable legal obligations (Model Rules)

Shared Values Approach:

Shared commitment to professional ideals (Model Code)

Regulatory Approach



Based on the "legal realist" school of thought:

- law is a business

- lawyers are technical experts who know how to manipulate the legal system for clients who pay for their services

- lawyer's personal values are irrelevant

Oliver Wendell Holmes

Regulatory Approach

In practice, that means:

- Developing a “generalized” code of ethics

- Applying the rules to business practices

- Enforcing the rules through a punitive mechanism

Rules of Professional Conduct

1.2 Scope of Representation

1.6 Confidentiality of Information

3.3 Disclosures to a tribunal

3.9 Disclosures to admin. agency

4.1 Disclosures to prevent criminal act

1.13 Organization as a Client

2.1 Attorney's role as Advisor

available on-line at:

http://www2.law.cornell.edu/cgi-bin/foliocgi.exe/modelrules/

Rules of Professional Conduct

1.2 Scope of Representation

- **A lawyer shall abide by a client's decisions concerning the objectives of representation**
- **A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows in criminal or fraudulent**

Rules of Professional Conduct

1.6 Confidentiality of Information

3.3 Disclosures to a tribunal

3.9 Disclosures to admin. agency

4.1 Truthfulness of disclosures

Do not knowingly misstate facts or law to a tribunal, or offer evidence that you know to be false. You may refuse to offer evidence that you reasonably believe to be false.

Rules of Professional Conduct

1.6 Confidentiality of Information

3.3 Disclosures to a tribunal

3.9 Disclosures to admin. agency

4.1 Truthfulness of disclosures

Do not reveal confidential information, except to prevent criminal act that you believe is likely to result in imminent death or substantial bodily harm.

Rules of Professional Conduct

1.13 Organization as a Client

- **A lawyer employed by an organization represents the organization**
- **If an officer or an employee is about to violate the law, the lawyer should:**
  - **Ask the officer or employee to reconsider action**
  - **Advise that a second legal opinion be sought**
  - **Refer matter to higher authority in the organization**

Rules of Professional Conduct

2.1 Attorney's role as Advisor

- **Exercise independent professional judgment**
- **Advice may include legal, moral, economic, social, and political considerations**

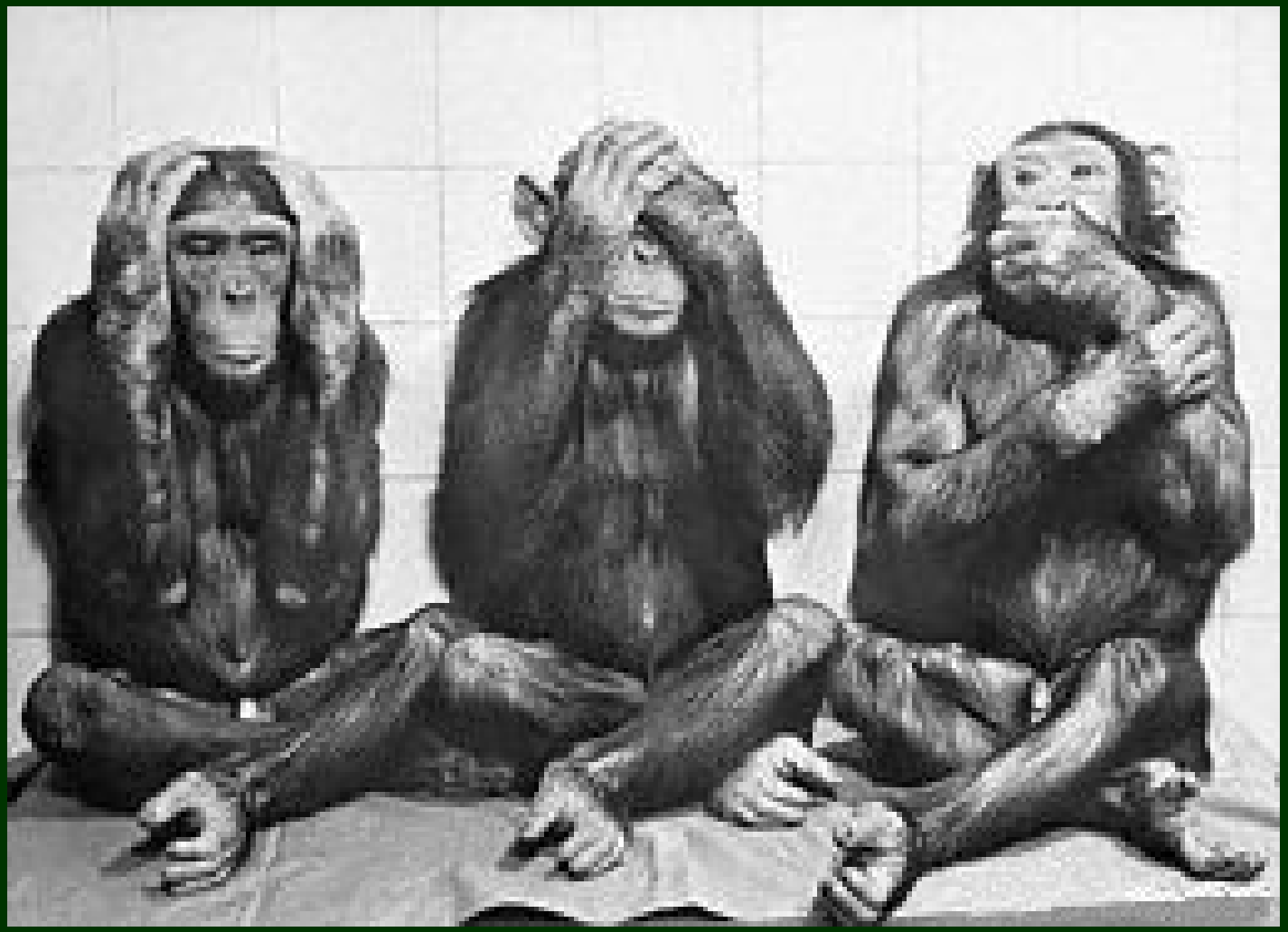
Regulatory Approach

If the client has a legal obligation, counsel him to comply with the law

Do not assist him in avoiding legal requirements.

But what should you do when your client's action places someone in danger of imminent death or substantial bodily harm?

Regulatory Approach



Model Rule 1.6?

Regulatory Approach

Model Rule 1.6 - Confidentiality:

Don’t disclose information, except:

1. To prevent criminal act likely to result in imminent death or substantial bodily harm

2. To defend yourself in a subsequent suit brought by the client

And, in Model Code DR 4-101 (1970):

3. To prevent a crime.

Regulatory Approach

Model Code (1970)	Model Rules (1983)		
NY	AL	KS	NC
MA	AK	KY	ND
OH	AZ	LA	OK
VT	AR	MD	PA
VA	CO	MI	RI
	CT	MN	SC
	DE	MS	SD
	DC	MO	TX
	FL	MT	UT
	HI	NV	VI
	ID	NH	WA
	IL	NJ	WV
	IN	NM	WI
			WY

Note: Most states adopting the Model Rules have altered Rule 1.6

Regulatory Approach (Model Rules)

What if your client is about to commit fraud?

Can’t disclose - no bodily harm

Or set up a non-traditional medical clinic?

Can’t disclose - harm not imminent

Or build a structurally deficient building?

Can’t disclose - act not criminal

Regulatory Approach

Rule 1.6 works best in an adversarial situation in a traditional litigation / advocacy model.

But attorneys often act as advisors in

a non-adversarial setting!

Regulatory Approach

Rule 1.6 has difficulty addressing situations where, as a result of your client's activities, innocent third parties will be harmed.

Regulatory Approach

What is the fix in 1.6?

Modify the Rule to allow greater disclosure

Hotly debated by ABA House of Delegates in 1983

- Would have allowed additional disclosure to prevent substantial injury to property interests or to rectify a client's criminal or fraudulent act in which the lawyer unknowingly p

REJECTED!

Regulatory Approach

What is the fix to 1.6?
Special Rules for Specialists

Justice Brandeis (1905):

"The leading lawyers … have erroneously assumed that the rule of ethics to be applied to a lawyer's advocacy is the same where he acts for private interests against the public, as it is in litigation between private individuals."

Regulatory Approach

What is the fix to 1.6?

Special Rules for Specialists

William Futrell, President of the Environmental Law Institute (1994):

"Many aspects of environmental practice may be … ill-suited to the adversary model of professional legal ethics, with its creed of zealous advocacy with little regard for the public interest or moral norms."

Regulatory Approach

What is the fix to 1.6?

Special Rules for Specialists

Proposed by law review authors, but changes of this type are not on the horizon.

Shared Values Approach

Rule 1.6 plus .....

- Lawyers have an obligation to the legal system and the public at large

- Services rendered to clients are only legitimate if they are consistent with the aims of law

Shared Values Approach

What are the "values"?

- Shared commitment to the legal system as a method for settling disputes

- Interpreting laws / regulations in light of their purpose instead of looking for technical loopholes

- Sharing of technical engineering data

- Protecting the innocent third party

Shared Values Approach

What should you do if disclosure is not permitted under Rule 1.6, but is necessary to protect an innocent third party?

See Mary Daly's article at 29 Loy. L.A. Rev 1611

Shared Values Approach

Daly's scenario:

- Innocent man convicted of murder will be executed

- The actual perpetrator tells his attorney how and where he committed the crime

- Should the attorney release this information in order to save the life of the innocent man?

Shared Values Approach

Both the Model Rules and Model Code are clear that this is privileged information and cannot be released

What would you do?

Shared Values Approach

An attorney **CAN** consider personal ethics in the advice he gives to clients

2.1 Attorney's role as Advisor

Exercise independent professional judgment

Advice may include legal, moral, economic, social, and political considerations

Shared Values Approach

Fortunately, most government attorneys should be able to avoid this dilemma

1.13 Organization as a Client

A lawyer employed by an organization represents the organization

If an officer or an employee is about to violate the law, the lawyer should:
Ask the officer or employee to reconsider action
Advise that a second legal opinion be sought
Refer matter to higher authority in the organization

Summary

What the rules require

What your moral values require

Scenario #1

The RCRA cleanup:

- Base X has an IRP pump and treat system in place to remedy TCE ground water contamination

- Samples from test wells show that the level of contamination is now below MCLs, and the State believes the site has been cleaned up

- You receive information revealing that significant contamination may still be present at greater depths

- Do we notify the State, and risk reopening the ROD?

Scenario #2

The toxic release:

- A tank truck is involved in an industrial accident and spills 1,000 gal of toxic material into the storm drain

- The fire department claims to have contained the spill on base, and the spill is being cleaned up

- There is an public water supply inlet in the river only 1/2 mile from the spill site

Scenario #3

That deafening noise:

- Your installation bedded down a new aircraft, severely impacting a nearby off-base housing area

- The EIS was classified, so the the residents never received notice -- only a nasty surprise

- You know the classified EIS was inadequate and did not address noise levels in this housing area

- Do you share any [unclassified] information with the residents?

Things to consider

- Regulatory violation vs. actual harm

- Bodily harm vs. economic harm

- Criminal vs. negligent conduct

- Past injury vs. future injury

- Your State's rules